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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

FCC 94-217
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In the Matter of)

Implementation of Section 309(j)
of the Communications Act -
Competitive Bidding)

PP Docket No. 93-253

Order on Reconsideration

Adopted: August 15, 1994

Released: August 15, 1994

By the Commission:

Introduction

1. On our own motion, pursuant to 47 C.F.R. § 1.108, we reconsider two aspects of the competitive bidding rules adopted for personal communications services in the 2 GHz band ("broadband PCS").¹ First, the Commission amends Section 24.720(l) to exempt from the affiliation rules, for purposes of eligibility to apply for licenses in frequency blocks C and F ("entrepreneurs' blocks"), entities owned and controlled by Indian tribes or Alaska Regional or Village Corporations. As recognized by Federal law and the Small Business Administration ("SBA") in its rules, these entities are inherently economically disadvantaged. We believe that these minority groups should be eligible to bid in the entrepreneurs' blocks, along with other designated entities, despite their affiliation with entities owned by tribes or the statutorily created and regulated Alaska Native corporations, which may have revenues or assets that exceed the general limits for eligibility in the entrepreneurs' blocks.

2. Second, we amend our rules governing attribution of gross revenues, total assets and personal net worth to establish an applicant's financial eligibility for the entrepreneurs' blocks. We will permit nonattributable investors in a corporate applicant to own up to 15 percent of the corporation's voting stock, provided that (as the rules still require) the applicant's control group retains at least 25 percent of the equity and 50.1 percent of the voting stock. This change applies the same attribution rules for investors in publicly-traded corporate applicants to investors in corporate

¹ See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Report and Order in PP Docket No. 93-253, FCC No. 94-178, released July 15, 1994, 9 FCC Rcd _____ (1994); 59 Fed. Reg. 37566 (July 22, 1994) ("Fifth Report and Order").

applicants that are not publicly traded. Introducing this additional flexibility into our attribution rules will attract investment to all types of corporations controlled by entrepreneurs' block eligibles and increase the level of participation by smaller corporate applicants that have decided against making a public offering of their stock.

Affiliation Rules

3. In the Fifth Report and Order, the Commission adopted rules providing that gross revenues, assets and personal net worth of affiliates of a broadband PCS applicant are attributed to the applicant and counted toward certain eligibility criteria.² These affiliation requirements are intended to prevent entities that, for all practical purposes, do not meet the Commission's size standards from receiving benefits targeted to smaller entities.³ These safeguards ensure, pursuant to Section 309(j)(3) of the Communications Act, that bona fide designated entities are provided with meaningful economic opportunities to participate in the provision of spectrum-based services.⁴ Generally, affiliation arises when the applicant (or an attributable investor in the applicant) controls or has power to control another entity or if the applicant (or an attributable investor in the applicant) is under the control of the other entity. In developing its affiliation rules, the Commission borrowed from rules that are used by SBA to make size determinations, including guidelines used to establish when a firm should be deemed an affiliate of an applicant and other safeguards designed to ensure that only qualified entities are eligible for special benefits under the SBA's "section 8(a)" program.⁵

4. The Commission failed, however, to adopt an exemption in the SBA's rules that excluded from affiliation coverage entities owned and controlled by Indian tribes or Alaska Regional or Village Corporations.⁶ SBA is required by statute generally to determine the size of a small business concern owned by an Indian tribe (or a wholly owned business entity of such tribe) "without regard to its affiliation with the tribe, any entity of tribal government, or any other business enterprise owned by the tribe."⁷

² See id. at Appendix B, Sections 24.709, 24.720(b), 24.720(e).

³ See id. at ¶¶ 156-168, 201.

⁴ See id. at ¶¶ 93-112.

⁵ Id. at ¶¶ 201-217.

⁶ See 13 C.F.R. § 121.401(b); see also id. §§ 121.1102(a), 124.112(c).

⁷ 15 U.S.C. 636(j)(10)(J)(ii). The term "Indian tribe" defined in 25 U.S.C. § 450b(e) includes "any Indian tribe, band nation, or other organized groups or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims

Under this statute, and others, "tribally-owned concerns" are considered "unique aggregations"⁸ and provided special access to government benefits because of their status as economically disadvantaged.⁹ In addition, Section 29(e) of the Alaska Native Claims Settlement Act (43 U.S.C. § 1626(e)) provides that:

(1) For all purposes of Federal law, a Native Corporation shall be considered to be a corporation owned and controlled by Natives and a minority and economically disadvantaged business enterprise if the Settlement Common Stock of the corporation and other stock of the corporation held by holders of Settlement Common Stock and by Natives and descendants of Natives, represents a majority of both the total equity of the corporation and the total voting power of the corporation for the purposes of electing directors.

(2) For all purposes of Federal law, direct and indirect subsidiary corporations, joint ventures, and partnerships of a Native Corporation qualifying pursuant to paragraph (1) shall be considered to be entities owned and controlled by Natives and a minority and economically disadvantaged business enterprise if the shares of stock or other units of ownership interest in any such entity held by such Native Corporation and by the holders of its Settlement Common Stock represent a majority of both--

(A) the total equity of the subsidiary corporation, joint venture, or partnership; and

(B) the total voting power of the subsidiary corporation, joint venture, or partnership for the purpose of electing directors, the general partner, or principal officers.

The SBA has incorporated these statutory provisions into its regulations.¹⁰

Settlement Act which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." See also 15 U.S.C. § 632(d) (defining "Qualified Indian tribe" for purposes of the Small Business Act; 25 C.F.R. Part 83 (Department of the Interior procedures for establishing that an American Indian group exists as an Indian tribe).

⁸ See, e.g., United States v. Antelope, 430 U.S. 641, 645 (1977); Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601, et seq.

⁹ See e.g. Indian Financing Act, 25 U.S.C. § 1451 et seq.; Buy Indian Act, 25 U.S.C. § 47 et seq.; and 25 U.S.C. §§ 13, 109, 218, 404 (U.S. Bureau of Indian Affairs grants and guaranteed loan programs).

¹⁰ See Small Business Size Standards, 54 Fed. Reg. 52634, 52635 (Dec. 21, 1989) (amending 13 C.F.R. §§ 121.401(b)); Small Business Size Regulations: Minority Small Business and Capital Ownership Development, 59 Fed. Reg. 12811 (March 18, 1994) (amending 13 C.F.R. §§ 121.1102(a), 124.112(c)).

5. We have ~~reexamined~~ our eligibility and affiliation rules and will make an amendment to these rules that is more consistent with the other Federal laws, policies and regulations cited above so as not to preclude the eligibility of entities owned and controlled by Indian tribes and Alaska Native Corporations for entrepreneurs' block licenses and for the benefits accorded businesses owned by members of minority groups. We believe that adoption of an affiliation exemption for Indian tribes and Alaska Native Corporations for purposes of eligibility in the entrepreneurs' blocks is consistent with these other Federal policies¹¹ and complies with the congressional mandate in the auction law.¹²

6. Specifically, this exemption will ensure that the congressional policies of ensuring that minority-owned businesses have the opportunity to participate in spectrum-based services will apply to a class of designated entities, Indian tribes and Alaska Native Corporations, that Congress has determined to be economically disadvantaged. As noted above, Indian tribes and Alaska Native Corporations are unique aggregations of very limited capital of historically disadvantaged people.¹³ Moreover, in the promotion of Native American "self-determination," the Federal government has a "unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole."¹⁴ Finally, without the exemption we adopt herein, the Commission would not be able to ensure that all classes of designated entities are provided meaningful opportunities to participate in broadband PCS spectrum auctions.

7. We note that Section 7(j)(10)(J) of the Small Business Act gives the SBA the discretion to consider tribal and other affiliations if it determines that one or more such tribally owned businesses have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category.¹⁵ We do not believe it is

¹¹ C.f. LaRose v. FCC, 494 F.2d 1145, 1146 n.2 (D.C. Cir. 1974).

¹² See 47 C.F.R. § 309(j)(4)(D), (3)(B).

¹³ See, e.g., H.R. Rep. No. 907, 93d Cong., 2d Sess. (1974) (Indian Financing Act); see also Letter to Honorable Reed E. Hundt, Chairman, Federal Communications Commission, from Roy M. Hunndorf, President, Cook Inlet Region, Inc., July 16, 1994; see also Testimony of Margaret Brown, Senior Vice President, Cook Inlet Region, Inc., before the Subcommittee on Minority Enterprise, Finance and Urban Development, U.S. House of Representatives, May 20, 1994.

¹⁴ 25 U.S.C. § 450a(b) (Congressional declaration of policy, Indian Self-Determination and Education Assistance Act). See also Morton v. Mancari, 417 U.S. 536, 555 (1974).

¹⁵ 15 U.S.C. § 636(j)(10)(J)(ii)(II).

necessary to make such a determination for broadband PCS auctions.¹⁶ The limited potential number of broadband PCS applicants that may benefit from this affiliation exemption will not present any unfair advantage to other eligible applicants that have had gross revenues up to \$125 million and assets of up to \$500 million. In addition, this exemption from the affiliation rules applies only to applicants for entrepreneurs' block licenses owned and controlled by Indian tribes and Alaska Native Corporations, not independent entities composed of individual Native Americans or other entities owned by members of this minority group. Thus, such entities will not have any unfair advantage over other minorities in the entrepreneurs' blocks.

Attribution Rules

8. As referenced in the above discussion, the Fifth Report and Order limited eligibility for the entrepreneurs' blocks to companies that have gross revenues of less than \$125 million in each of the last two years and total assets of less than \$500 million at the time of filing.¹⁷ In addition, no attributable investor or affiliate could have \$100 million or more in personal net worth.¹⁸ For purposes of determining eligibility, we attribute to the applicant the gross revenues, assets and net worth of certain investors and affiliates. We adopted the attribution and affiliation rules to prevent ineligible parties from exerting undue control over firms eligible to apply for entrepreneurs' block licenses and to ensure that only bona fide applicants receive broadband PCS licenses. At the same time, we recognized that passive investment in entrepreneurs' block applicants would be critical to the successful development of these smaller companies. To balance these competing considerations, we decided not to attribute investors in corporate applicants that own a 25 percent or less passive equity interest.¹⁹

9. Passive equity in a corporate applicant was defined to include non-voting stock and no more than 5 percent of the voting stock.²⁰ An exception was created, however for evaluating a publicly-traded corporation's financial eligibility in the entrepreneurs' blocks: an investor's ownership of no more than 15 percent of the voting stock in a publicly-traded corporate applicant would be considered passive

¹⁶ We will retain the discretion, on a service-specific basis, to determine whether providing this exemption from similar affiliation rules applicable to other auctionable services would give these entities a substantial unfair competitive advantage.

¹⁷ Fifth Report and Order, ¶¶ 118-128, 156-157, Appendix B, Section 24.709.

¹⁸ Id.

¹⁹ Id. at Appendix B, Section 24.709(b)(4).

²⁰ Id. at ¶ 158; Appendix B, § 24.720(j).

equity. We raised the attribution level to 15 percent in this instance because we found the 5 percent voting stock rule would cause hardship to publicly-traded companies, where the stock is widely held and there is little ability to control insubstantial stock ownership.²¹

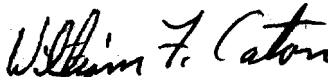
10. We now believe that investors in all corporate applicants, including those that are not publicly traded, should be able to include in their 25 percent passive equity investment up to 15 percent of the applicant's voting stock. Both publicly traded and non-publicly traded applicants would have difficulty attracting substantial investment if each individual investor could own no more than 5 percent of the voting stock. Investors that are prepared to devote considerable funds to an entrepreneurs' block applicant should reasonably expect to exercise some ability to protect their investment through a modest level of voting stock ownership. The 15 percent voting stock limit would, in this respect, not rise to the level of a controlling interest, but, from the investor's perspective, could diminish the substantial risks associated with committing funds to a PCS applicant and enhance the potential rewards for providing start-up capital to these new ventures.

Conclusion

11. Accordingly, IT IS ORDERED that Part 24 of the Commission's Rules is amended as set forth in the attached Appendix A.

12. IT IS FURTHER ORDERED that the rules changes made herein WILL BECOME EFFECTIVE 30 days after their publication in the Federal Register. This action is taken pursuant to Sections 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 309(j).

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

²¹ Id. at ¶ 163.

APPENDIX A

FINAL RULES

Part 24 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 24 continues to read as follows:

AUTHORITY: Secs. 4, 301, 302, 303, 309 and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 301, 302, 303, 309 and 332, unless otherwise noted.

2. Section 24.709 is amended by removing paragraph (b)(4)(iii) and revising paragraph (e) to read as follows:

§ 24.709 Eligibility for licenses for frequency Blocks C and F.

* * * * *

(e) **Definitions.** The terms *affiliate, business owned by members of minority groups and women, consortium of small businesses, control group, gross revenues, members of minority groups, passive equity, personal net worth, and total assets* used in this section are defined in § 24.720.

3. Section 24.711 is amended by revising paragraph (a)(4) to read as follows:

§ 24.711 Installment payments for licenses for frequency Blocks C and F.

(a)* * *

(4) For purposes of determining whether an applicants has \$75 million or less in gross revenues, gross revenues shall be attributed to the applicant and aggregated as provided in § 24.709(b).

* * * * *

4. Section 24.720 is amended by revising paragraphs (b)(2) and (j), by adding a new paragraph (l)(11) and by removing paragraph (m) to read as follows:

§ 24.720 Definitions.

* * * * *

(b)***

(2) For purposes of determining whether an entity meets the \$40 million gross revenues and \$40 million personal net worth standards in paragraph (1), gross revenues and personal net worth shall be attributed to the entity and aggregated as provided in § 24.709(b).

(j) **Passive Equity.** *Passive equity* shall mean (i) for corporations, non-voting stock or stock that includes no more than fifteen percent of the voting equity; (ii) for partnerships, joint ventures and other non-corporate entities, limited partnership interests and similar interests that do not afford the power to exercise control of the entity.

(l)***

(11) **Exclusion from affiliation coverage.** For purposes of § 24.709, Indian tribes or Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601, et seq.), or entities owned and controlled by such tribes or corporations, are not considered affiliates of an applicant owned and controlled by such tribes or corporations.